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8 UNITED STATES DISTRICT COURT

9 EASTERN DISTRICT OF CALIFORNIA

10 ROBERT T. MATSUI FEDERAL COURTHOUSE

11 CALIFORNIA SPORTFISHING  
12 PROTECTION ALLIANCE,

13 Plaintiff,

14 v.

15 KATHLEEN ALLISON, in her  
16 official capacity as Secretary  
of the California Department of  
Corrections and Rehabilitation,

17 Defendants.

18 COUNTY OF AMADOR, a public  
19 agency of the State of  
California,

20 Plaintiff,

21 v.

22 KATHLEEN ALLISON in her  
23 official capacity as Secretary  
of the California Department of  
Corrections and Rehabilitation;  
24 PATRICK COVELLO in his official  
capacity of Warden of  
California Department of  
Corrections and Rehabilitation  
25 Mule Creek State Prison,

26 Defendants.

Case No. 2:20-cv-02482-WBS-AC

PLAINTIFFS COUNTY OF AMADOR'S  
AND CALIFORNIA SPORTFISHING  
PROTECTION ALLIANCE'S  
SEPARATE STATEMENT OF  
UNDISPUTED FACTS IN SUPPORT  
OF PLAINTIFFS' MOTION FOR  
SUMMARY ADJUDICATION

No. 2:21-cv-0038-WBS-AC

Date: Aug. 22, 2022

Time: 1:30 p.m.

Court: 5

Action Filed: Jan. 7, 2021  
Trial Date: April 18, 2023

[Filed with:

1. Not. & P.& A;
2. Decls. of Ashby, Opalenik,  
Andrews, Carlon, Emerick,  
Taylor, Evatt, and  
McHenry;
4. Appendix of Exs.;
5. [Proposed] Order]

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1                   SEPARATE STATEMENT OF UNDISPUTED FACTS

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3                   Pursuant to Federal Rule of Civil Procedure 56 and Local  
4 Rule 260(a), Plaintiffs County of Amador ("Amador") and  
5 California Sportfishing Protection Alliance ("CSPA") submit their  
6 Statement of Undisputed Facts in support of their Motion for  
7 Summary Adjudication, together with references to supporting  
8 material facts and cites to supporting evidence.

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10                  ISSUE NO. 1: Amador has standing.

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>OPPOSING PARTY'S RESPONSE</u>
<u>AND SUPPORTING EVIDENCE</u>	<u>AND SUPPORTING EVIDENCE</u>

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14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	1. Amador hired an engineering firm to investigate contamination from Mule Creek State Prison ("MCSP"). Declaration of Michelle Opalenik, filed concurrently ("Opalenik Decl."), ¶ 3; Carlton Engineering Inc. report, dated Dec. 6, 2006, ex. 1.
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	2. Amador established the Amador Safe Drinking Water Program to connect drinking water wells within 1 mile of
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1 MCSP that have nitrate levels  
2 in excess of the maximum  
3 contaminant level to the  
4 community water system.  
5 Opalenik Decl., ¶ 4; Amador  
6 Board of Supervisors' Reso.  
7 No. 07-163, adopted Aug. 7,  
8 2007, ex. 2.

9 3. Amador provided a grant  
10 of an amount not to exceed  
11 \$18,830 to a property owner to  
12 fund construction of a  
13 connection to the community  
14 water system under the  
15 Program. Opalenik Decl., ¶ 5;  
16 Construction Contract, dated  
17 Sept. 6, 2007, ex. 3.

18  
19 4. Amador continues to  
20 devote staff time to monitor  
21 releases from MCSP. Opalenik  
22 Decl., ¶ 6; memorandum for  
23 Community Development Director  
24 to Board of Supervisors, dated  
25 Jan 21, 2020, ex. 4.

1       5. Defendants failed to  
2 describe additional BMPs that  
3 it would implement to prevent  
4 or reduce any pollutants, and  
5 failed to submit an  
6 implementation schedule for  
7 those BMPs as required by the  
8 Small M4 Permit. Declaration  
9 of Karen Ashby, filed  
10 concurrently ("Ashby Decl."),  
11 ¶ 6.M; Central Valley Regional  
12 Water Quality Control Board  
13 ("Regional Board") comment  
14 letter, dated Feb. 11, 2022,  
15 ex. 17.

17 ISSUE NO. 2: CSPA has standing.

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19       UNDISPUTED MATERIAL FACTS

20       AND SUPPORTING EVIDENCE

OPPOSING PARTY'S RESPONSE

AND SUPPORTING EVIDENCE

22       6. CSPA's members use and  
23 enjoy the waters downstream  
24 from Mule Creek State Prison  
25 for recreational, aesthetic,  
26 and commercial purposes.

27 Declaration of Richard

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	McHenry, filed concurrently ("McHenry Decl."), ¶¶ 13-14; Declaration of Edmund Taylor, filed concurrently ("Taylor Decl."), ¶¶ 2-10; Declaration of Katherine Evatt, filed concurrently ("Evatt Decl."), ¶¶ 4-15.
7. CSPA's members are concerned about the harmful effect of Defendants' polluted discharges on the waters downstream of Mule Creek State Prison. McHenry Decl., ¶¶ 16-17; Taylor Decl., ¶¶ 12-19; Evatt Decl., ¶¶ 16-19.	
8. CSPA's members' use and enjoyment of the waters downstream of Mule Creek State Prison has been lessened by Defendants' polluted discharges. McHenry Decl., ¶ 15-16; Taylor Decl., ¶¶ 12-19; Evatt Decl., ¶¶ 16-19.	
9. CSPA's mission is directly related to protecting the quality of California's	

<p>1 waters. McHenry Decl., ¶¶ 5-  2 12.</p> <p>3 10. Defendants failed to  4 describe additional BMPs that  5 it would implement to prevent  6 or reduce any pollutants and  7 failed to submit an  8 implementation schedule for  9 those BMPs as required by the  10 Small M4 Permit. Ashby Decl.,  11 ¶ 6.M; Central Valley Regional  12 Water Quality Control Board  13 ("Regional Board") comment  14 letter, dated Feb. 11, 2022,  15 ex. 17.</p>	
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17 ISSUE NO. 3: Mule Creek is a Water of the United States.  
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<u>UNDISPUTED MATERIAL FACT</u> <u>AND SUPPORTING EVIDENCE</u>	<u>OPPOSING PARTY'S RESPONSE</u> <u>AND SUPPORTING EVIDENCE</u>
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<p>21 11. Mule Creek is a tributary  22 with a significant nexus to  23 the Mokelumne River, a  24 traditionally navigable water.  25 Declaration of Rebecca  26 Andrews, filed concurrently  27 ("Andrews Decl."), ¶ 5; Draft</p>	
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1 Environmental Impact Report  
2 for the Mule Creek Infill  
3 Complex expansion project,  
4 dated June 2013 ("MCIC DEIR"),  
5 v. 3, ex. 19, p. 811.

6 12. State Board and Regional  
7 Board consider Mule Creek a  
8 water of the United States.  
9 Ashby Decl., ¶¶ 6.C, 6.J;  
10 Regional Board 13383 Order,  
11 dated Dec. 16, 2020, find. 2,  
12 ex. 7, p. 81; State Board  
13 Small MS4 Permit, adopted Feb.  
14 5, 2013, find. 14, ex. 13, p.  
15 336.

16 13. Defendants have  
17 acknowledged that Mule Creek  
18 is a water of the United  
19 States because of its riparian  
20 habitat and seasonal flows.  
21 Andrews Decl., ¶¶ 5, 6; MCIC  
22 DEIR v. 3, ex. 19, p. 811; 401  
23 Certification cover letter,  
24 dated June 10, 2019, ex. 20,  
25 p. 814.

14. The beneficial uses of  
2 Mule Creek are described in  
3 the Basin Plan to include,  
4 among other things, municipal  
5 and domestic supply,  
6 agricultural supply,  
7 recreation, and wildlife  
8 habitat. Ashby Decl., ¶ 6.E;  
9 Regional Board Water Quality  
10 Control Plan for the  
11 Sacramento River Basin and the  
12 San Joaquin River Basin, rev'd  
13 May 2018 ("Basin Plan") tbl.  
14 2-1, ln. 59, ex. 9, p. 137.  
15

16 ISSUE NO. 4: Defendants violated the Small MS Permit Discharge  
17 Provision B.1.

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19 UNDISPUTED MATERIAL FACT  
20 AND SUPPORTING EVIDENCE

OPPOSING PARTY'S RESPONSE  
AND SUPPORTING EVIDENCE

21 15. Provision B.1 of the  
22 Small MS4 Permit provides,  
23 "Discharges of waste from the  
24 MS4 that are prohibited by  
25 Statewide Water Quality  
Control Plans or applicable  
Regional Water Quality Control

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	Plans (Basin Plans) are prohibited." Ashby Decl., ¶ 6.J; Small MS4 Permit, ex. 13, p. 346.
	16. Defendants have past violations of the Small MS4 Permit's <i>E. coli</i> discharge prohibition on forty-one days. Ashby Decl., ¶¶ 10, 11, tbls. 2, 3.
	17. Defendants have ongoing violations of the Small MS4 Permit's <i>E. coli</i> discharge prohibition on nine days. Ashby Decl., ¶ 17, tbl. 8.
	18. Defendants have past violations the Small MS4 Permit's metal discharge prohibition on twenty-five days. Ashby Decl., ¶ 14, tbl. 5.
	19. Defendants have ongoing violations of the Small MS4 Permit's metal discharge prohibition on seventy-seven days. Ashby Decl., ¶ 20, tbl.

<p>1           10.</p> <p>2         20. <i>E. coli</i> and metals</p> <p>3         discharged from the Facility</p> <p>4         are waste. Ashby Decl., ¶¶</p> <p>5         6.J, 6.A, 6.N, 24.B, 24.D;</p> <p>6         Small MS4 Permit attach. I,</p> <p>7         ex. 13, p. 614; Stormwater</p> <p>8         Report, ex. 5, p. 64;</p> <p>9         Declaration of Robert Emerick,</p> <p>10         filed concurrently ("Emerick</p> <p>11         Decl."), ¶¶ 18-20; Plaintiffs'</p> <p>12         Lab Samples, ex.18.</p>	
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14         ISSUE NO. 5: Defendants violated the Small MS Permit Discharge  
 15         Provision B.2.

<u>UNDISPUTED MATERIAL FACT</u>	<u>OPPOSING PARTY'S RESPONSE</u>
<u>AND SUPPORTING EVIDENCE</u>	<u>AND SUPPORTING EVIDENCE</u>
<p>19         21. Provision B.2 of the</p> <p>20         Small MS4 Permit provides,</p> <p>21         "Discharges of storm water</p> <p>22         from the MS4 to waters of the</p> <p>23         U.S. in a manner causing or</p> <p>24         threatening to cause a</p> <p>25         condition of pollution or</p> <p>26         nuisance as defined in Water</p> <p>27         Code § 13050 are prohibited."</p>	

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	Ashby Decl., ¶ 6; Small MS4 Permit, ex. 13, p. 346.  22. Defendants have past violations of the Small MS4 Permit's <i>E. coli</i> discharge prohibition on 49 days. Ashby Decl., ¶ 10, tbl. 2.  23. Defendants have ongoing violations of the Small MS4 Permit's <i>E. coli</i> discharge prohibition on nine days. Ashby Decl., ¶ 17, tbl. 8.  24. Defendants have past violations of the Small MS4 Permit's metal discharge prohibition on twenty-five days. Ashby Decl., ¶ 14, tbl. 5.  25. Defendants have ongoing violations of the Small MS4 Permit's metal discharge prohibition on seventy-seven days. Ashby Decl., ¶ 20, tbl. 10.  26. <i>E. coli</i> and metals discharged from the Facility are waste. Ashby Decl., ¶¶
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1       6.J, 6.A, 6.N, 24.B, 24.D;  
 2       Small MS4 Permit attach. I,  
 3       ex. 13, p. 614; Stormwater  
 4       Report, ex. 5, p. 64; Emerick  
 5       Decl., ¶¶ 18-20; Plaintiffs'  
 6       Lab Samples, ex.18.

8       ISSUE NO. 6: Defendants violated the Small MS Permit Discharge  
 9       Provision B.3.

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<u>UNDISPUTED MATERIAL FACT</u>	<u>OPPOSING PARTY'S RESPONSE</u>
<u>AND SUPPORTING EVIDENCE</u>	<u>AND SUPPORTING EVIDENCE</u>

14      27. Discharge Prohibition B.3  
 15     requires that "[d]ischarges  
 16     through the MS4 of material  
 17     other than storm water shall  
 18     be effectively prohibited,  
 19     except as allowed under this  
 20     Provision or as otherwise  
 21     authorized by a separate NPDES  
 22     permit." Ashby Decl., ¶ 6.J;  
 23     Small MS4 Permit, ex. 13, p.  
 24     346.

25      28. There are hundreds of  
 26     defects in both the MS4 and  
 27     the sanitary sewer that allow

1 for indirect connections  
2 between the two systems.  
3 Declaration of William Carlon,  
4 filed concurrently ("Carlon  
5 Decl."), ¶¶ 3-4; Regional  
6 Board Review of Revised Storm  
7 Water System Investigation  
8 Findings Report, Dec. 7, 2020,  
9 ex. 21, pp. 870, 872-74, 884-  
10 88; EPA Inspection Report,  
11 Jan. 28, 2021, ex. 22, p. 901.

12 29. Both the Regional Board  
13 and EPA have determined that  
14 wastewater is entering the MS4  
15 as a result of the defects in  
16 the MS4 and sanitary sewer  
17 systems. Carlon Decl., ¶¶ 3-4;  
18 Regional Board Review of  
19 Revised Storm Water System  
20 Investigation Findings Report,  
21 Dec. 7, 2020, ex. 21, p. 870,  
22 872-74, 884-88; EPA Inspection  
23 Report, Jan. 28, 2021, ex. 22,  
24 p. 901.

25 30. Defendants' regularly  
26 discharge irrigation water  
27 from its MS4. Regional Board

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	Water Code Section 13383 Order, Dec. 22, 2020, ex. 7, p. 82.  31. Irrigation runoff is due to defects in the irrigation system. Carlon Decl., ¶ 5; Comments to the Non-Storm Water Discharge Elimination Plan, April 11, 2022, ex. 23, p. 941.  32. During Plaintiffs' dry- weather inspection in March 2022, the MS4 had water within the system, and the sampling results of that water included high concentrations of bacteria, as well as pharmaceuticals. Emerick Decl., ¶¶ 4, 13-20; March 9, 2022 Sampling Data, ex. 18, p. 741 (fecal coliform was between 79-1600 MPN/100 mL; total coliform greater than 1600 MPN/100 mL in each sample, and <i>E. coli</i> was present in all samples), and p. 759-767 (sampling showed
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1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	the presence of pharmaceuticals).
	33. Non-storm water has been entering and discharging from the MS4 since at least January 2018 when the Regional Board inspected the Facility. Carlon Decl., ¶ 6; Regional Board Water Code Section 13267 Order, Feb. 14, 2008, ex. 24, p. 949.
	34. Defendants have not corrected the problem, and non-storm water continues to discharge through the MS4. EPA Inspection Report, Jan. 28, 2021, ex. 22, p. 901; Ashby Decl., ¶¶ 24-25.

ISSUE NO. 7: Defendants violated the Small MS4 Permit Receiving Water Limitation Provision D.

<u>UNDISPUTED MATERIAL FACT</u> <u>AND SUPPORTING EVIDENCE</u>	<u>OPPOSING PARTY'S RESPONSE</u> <u>AND SUPPORTING EVIDENCE</u>
35. Provision D of the Small MS4 Permit provides, in	

1 relevant part, that  
2 "Discharges shall not cause or  
3 contribute to an exceedance of  
4 water quality standards  
5 contained in a Statewide Water  
6 Quality Control Plan, the  
7 California Toxics Rule (CTR),  
8 or in the applicable Regional  
9 Water Board Basin Plan." Ashby  
10 Decl., ¶ 6.J; Small MS4  
11 Permit, ex. 13, p. 348.

12 36. Defendants have past  
13 violations of Mule Creek's *E.*  
14 *coli* receiving water  
15 limitation on nineteen days.  
16 Ashby Decl., ¶ 12, tbl. 4.

17 37. Defendants have ongoing  
18 violations of Mule Creek's *E.*  
19 *coli* receiving water  
20 limitation on five days. Ashby  
21 Decl., ¶ 19, tbl. 9.

22 38. Defendants have past  
23 violations of Mule Creek's  
24 metals receiving water  
25 limitation on fourteen days.  
26 Ashby Decl., ¶ 15, tbl. 6.

27 39. Defendants have ongoing  
28

<p>1 violations of Mule Creek's  2 metals receiving water  3 limitation on twenty-nine  4 days. Ashby Decl., ¶ 21, tbl.  5 11.</p>	
<p>6 40. Defendants failed to  7 describe additional BMPs that  8 will be implemented to prevent  9 or reduce any pollutants; and  10 failed to submit an  11 implementation schedule for  12 those BMPs as required by the  13 Small MS4 Permit. Ashby Decl.,  14 ¶ 6.M; Feb. 11, 2022 letter  15 from Regional Board to  16 Defendant Covello, ex. 719, p.  17 719.</p>	
<p>18 <u>UNDISPUTED MATERIAL FACT</u>  19 <u>AND SUPPORTING EVIDENCE</u></p> <p>20 41. Industrial General Permit  21 Provision XVIIB.1 requires  22 that Industrial Materials and  23 Activities are protected by a  24 Storm-Resistant Shelter to  25 prevent all exposure to rain,  26 snow, snowmelt, and/or runoff.  27 Ashby Decl., ¶ 6.K; Industrial</p>	<p>OPPOSING PARTY'S RESPONSE  <u>AND SUPPORTING EVIDENCE</u></p>

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	General Permit, ex. 15, p. 685.  42. Loading and unloading activities are taking place in an area that has no side coverings exposing materials within the loading dock is subject to wind dispersion.  Ashby Decl., ¶ 26.B, 6.L; ¶ Regional Board NEC Inspection Report, dated Feb. 11, 2021 ("NEC Inspection Report"), fig. 2 (aerial photograph showing loading docks), ex. 16, p. 706.  43. Pallets are stored outside the industrial buildings in areas exposed to rain. Ashby Decl., ¶ 26.A.  44. Industrial General Permit Provisions XVII.B.1 and XVIIIB.3 require that waste materials be stored in a Storm-Resistant Shelter to prevent all exposure to rain, snow, snowmelt, and/or runoff.  Ashby Decl., ¶ 6.K; Industrial
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1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	General Permit, ex. 15, p. 685.	
45. Hazmat igloo containing food grade mineral oil for equipment lubrication is leaking. Ashby Decl., ¶ 25.B; ¶ 6.L; NEC Inspection Report, fig. 3, legend note 2, ex. 15, p. 707 ("Hazmat 'igloos' containing food grade mineral oil for equipment lubrication").		
46. Industrial General Permit Provisions XVII.E.1 requires that if one or more drainage areas require NOI [Notice of Intent General Permit] coverage, dischargers shall register for NOI coverage for the entire facility. Ashby Decl., ¶ 6.K; Industrial General Permit, ex. 15, p. 687.		
47. The loading docks drain to a Facility outfall. Ashby Decl., ¶ 6.L; NEC Inspection		

Report, 7, fig. 3, ex. 15, p.  
707 (blue arrows point to  
drain inlets outside loading  
docks).

Dated: June 28, 2022

BEST BEST & KRIEGER LLP

By: /s/ Gene Tanaka

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Dated: June 28, 2022

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